

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT LEE WHITESELL, JR.,)

Petitioner,)

vs.)

BRIAN WILLIAMS, *et al.*,)

Respondents.)

2:09-cv-2172-PMP-RJJ

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss. (Docket #15).

I. Procedural History

On April 25, 2002, the Eighth Judicial District Court for the State of Nevada entered a judgment of conviction against petitioner. (Exhibit 51).¹ Pursuant to a jury verdict of guilt, petitioner was convicted of Count 1 (burglary), Count 2 (robbery with use of a deadly weapon, victim 65 years of age or older, Count 3 (murder with the use of a deadly weapon, victim 65 years of age or older), and Count 4 (possession of stolen property). (Exhibit 51). Petitioner was sentenced to the following: Count I, 22-96 months; Count II, 35-156 months with an equal and consecutive term of 35-156 months for the use of a deadly weapon and victim 65 years of age or older; Count 3, life without the possibility of parole with an equal and consecutive term of life without the possibility of

¹ The exhibits referenced in this order are found in the Court's record at Docket #16-20.

1 parole for the use of a deadly weapon and victim 65 years of age or older; and Count 4, 12 to 48
2 months. (Exhibit 51). Counts 1 through 4 were imposed concurrent to one another. (*Id.*).

3 On May 14, 2002, petitioner filed a notice of appeal from the conviction. (Exhibit 52). On
4 February 11, 2004, the Nevada Supreme Court affirmed petitioner's conviction. (Exhibit 57).
5 Remittitur issued on March 9, 2004. (Exhibit 60).

6 On December 17, 2004, petitioner filed a *pro per* post-conviction habeas petition in state
7 court. (Exhibit 62). On December 6, 2005, a stipulation and order was entered, allowing counsel to
8 file a supplemental petition. (Exhibit 79). The supplemental petition was filed on December 23,
9 2005. (Exhibit 80). On July 7, 2006, counsel filed a supplement to the supplemental post-
10 conviction petition. (Exhibit 87). An evidentiary hearing was held on July 7, 2006. (Exhibit 88).
11 The evidentiary hearing was continued to August 14, 2006. (Exhibit 89). On September 1, 2006,
12 petitioner filed a post-hearing brief on his supplemental petition. (Exhibit 92). Supplemental
13 exhibits were filed on September 28, 2006. (Exhibit 94). On November 13, 2006, petitioner filed
14 supplemental authority in support of his post-conviction petition. (Exhibit 95). On December 28,
15 2006, petitioner filed additional supplemental authority in support of his post-conviction claims.
16 (Exhibit 98).

17 On March 9, 2007, the state district court held a hearing on the habeas petition. (Exhibit
18 104). At the hearing, the court vacated petitioner's conviction for possession of stolen property
19 because it was a lesser-included offense to robbery. (Exhibit 104, at pp. 7-8). On April 5, 2007, the
20 state district court issued findings of fact, conclusions of law, and order, denying the habeas petition
21 on all other grounds. (Exhibit 105). Petitioner filed a notice of appeal on April 10, 2007. (Exhibit
22 107). On April 12, 2007, the state district court filed a second findings of fact, conclusions of law,
23 and order. (Exhibit 108). An amended notice of appeal was filed on April 20, 2007. (Exhibit 112).

24 Petitioner filed his opening brief in the Nevada Supreme Court on July 13, 2007. (Exhibit
25 117). On November 3, 2009, the Nevada Supreme Court issued its order of affirmance. (Exhibit
26 133). Remittitur was issued on December 1, 2009. (Exhibit 134).

1 This Court received petitioner's *pro se* federal habeas petition on November 12, 2009.
2 (Docket #1). The petition contains eleven grounds for relief. (*Id.*). Respondents have filed the
3 instant motion to dismiss, asserting that Grounds One and Nine are unexhausted. (Docket #15).

4 **II. Discussion**

5 **A. Exhaustion Standard**

6 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has
7 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28
8 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his
9 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.
10 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
11 unexhausted until the petitioner has given the highest available state court the opportunity to
12 consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
13 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

14 A habeas petitioner must "present the state courts with the same claim he urges upon the
15 federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications
16 of a claim, not just issues of state law, must have been raised in the state court to achieve exhaustion.
17 *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To
18 achieve exhaustion, the state court must be "alerted to the fact that the prisoner [is] asserting claims
19 under the United States Constitution" and given the opportunity to correct alleged violations of the
20 prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195
21 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) "provides a simple and
22 clear instruction to potential litigants: before you bring any claims to federal court, be sure that you
23 first have taken each one to state court." *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting
24 *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

25 A claim is not exhausted unless the petitioner has presented to the state court the same
26 operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California*

1 *Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met
2 when the petitioner presents to the federal court facts or evidence which place the claim in a
3 significantly different posture than it was in the state courts, or where different facts are presented at
4 the federal level to support the same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir.
5 1988); *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F.
6 Supp. 455, 458 (D. Nev. 1984).

7 **B. Ground One**

8 In Ground One of the petition, petitioner claims that his Sixth Amendment right to
9 confrontation was violated because, at the preliminary hearing, he was denied the right to a full and
10 fair cross-examination of a witness; (2) the State did not meet the standard for showing that police
11 informant Stephen Patzig was unavailable; and (3) appellate counsel was ineffective for failing to
12 file a writ of certiorari after the *Crawford* decision was issued. (Petition, Docket #7). Respondents
13 argue that petitioner's statement that Patzig should not have been considered an "unavailable
14 witness" is unexhausted. In his opening brief on appeal regarding his state habeas petition,
15 petitioner presented this claim to the Nevada Supreme Court. (Exhibit 117). This Court finds that
16 petitioner fairly presented the substance of Ground One to the Nevada Supreme Court. Ground One
17 of the federal habeas petition is exhausted and may proceed.

18 **C. Ground Nine**

19 In Ground Nine of the petition, petitioner asserts that trial counsel was ineffective for failing
20 to conduct cross examination of the State's DNA expert. (Docket #7). Respondents argue that the
21 federal petition contains reference to "Exhibit 88" and a statement that: "The state witness led the
22 court and jury to believe that all evidence given was against the Defendant." In his opening brief on
23 appeal regarding his state habeas petition, petitioner presented this claim to the Nevada Supreme
24 Court. (Exhibit 117). This Court finds that petitioner fairly presented the substance of Ground Nine
25 to the Nevada Supreme Court. Ground Nine of the federal habeas petition is exhausted and may
26 proceed.

1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (Docket #15) is
3 **DENIED.**

4 **IT IS FURTHER ORDERED** that respondents **SHALL FILE AN ANSWER** to the
5 petition within **thirty (30) days** from the entry of this order. The answer shall include substantive
6 arguments on the merits as to each claim in the petition. **No further motions to dismiss will be**
7 **entertained.** In filing the answer, respondents shall comply with the requirements of Rule 5 of the
8 Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254.

9 **IT IS FURTHER ORDERED** that petitioner may file his reply to the answer, if any, no
10 later than **thirty (30) days** after being served with the answer.

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12 DATED: January 19, 2011.

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15 PHILIP M. PRO
16 United States District Judge
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